

**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2018-364-WS**

Stephen and Beverly Noller and	)	
Michael and Nancy Halwig,	)	
Complainants,	)	
v.	)	COMPLAINANTS' BRIEF
	)	CONFIRMING JURISDICTION
Daufuskie Island Utility Co., Inc.,	)	
Respondent.	)	
_____	)	

Complainants Michael and Nancy Halwig and Beverly and Stephen Noller hereby provide this brief to address the jurisdiction of the Public Service Commission of South Carolina (the "Commission") as requested by the Commission. The parties were scheduled for the hearing in this case on February 28, 2019. Prior to the scheduled hearing, on February 26, 2019, counsel for the Commission contacted counsel for both parties and asked for a brief regarding jurisdiction and postponed the hearing pending the Commission's decision on its jurisdiction. For the reasons set forth below, the Commission has jurisdiction to hear this matter and to provide relief to Complainants.

**BACKGROUND**

Complainants are property owners on Daufuskie Island, specifically on Driftwood Cottage Lane in the Melrose Plantation Subdivision of Daufuskie Island. Daufuskie Island Utility Company ("DIUC") is the sole utility provider for the Melrose community. Complainants have no choice but to obtain water and sewer service from DIUC. The Complaint in this matter concerns the refusal of DIUC to provide water or sewer to the Halwigs and Nollers following damage to its mains under a portion of Driftwood Cottage Lane. DIUC insisted that these customers plan, obtain the permits for, and pay for the construction and installation of mains connecting the water and sewer mains on Martinangel Road to those on Driftwood Cottage Lane adjacent to their properties before it would restore service. Complainants engaged an engineer, hired a contractor and began installation in November 2017 so they could get water and sewer service restored and stop the suffering of the loss of use of their homes since October 2016. In January 2018 DIUC offered a written agreement (the Customer Service Agreement) requiring Complainants pay for the installation that they had already begun. Rather than walk away from and abandon their homes, and since they were already installing the replacement mains, Complainants signed the agreement. Following the installation of the replacement water and sewer mains, DIUC refused again to provide service until Complainants signed a new agreement.

Additional background information is presented in the documents filed in this matter, and Complainants refer to and incorporate herein all allegations of the Complaint and all pre-filed testimony with exhibits of Complainants and Respondent in this matter.

## ARGUMENT

The Commission has jurisdiction in this matter pursuant to S.C. Code Ann. Section 58-5-210, *et seq.*, which provides that the Commission is “vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this state.” This statute provides broad authority to this Commission concerning the operations and service furnished by public utilities. The Commission has jurisdiction over this matter because DIUC’s actions denied service to its existing customers, failed to comply with the Commission’s regulations, and was based on an unauthorized agreement. Moreover, DIUC’s decisions usurp this Commission’s authority by unilaterally deciding what costs would be allowed or not allowed under its approved Rate Tariff or future rate decisions of the Commission. Complainants have requested relief from the Commission, both in the form of a reimbursement of expenses forced upon Complainants and any further or other relief the Commission may grant. It is acknowledged that water service was restored upon agreement of the ORS, Respondent and Complainants that such restoration of service during the pendency of this matter would not prejudice any of the parties.

At the start it is important to note that the Commission is a creature of statute, and its authority is limited to that granted by the statutes. *Nucor Steel, a Div. of Nucor Corp. v. Public Service Comm.*, 310 S.C. 539, 426 S.E.2d 319 (S.C. 1992)(citations omitted). Such statutes must be interpreted according to their clear meaning. *Id.* The regulations promulgated by the Commission likewise are derived from the statute, and, in interpreting the statute and regulations, they must be given their plain meaning. *See Doe v. South Carolina Dept. of Health and Human Services*, 727 S.E.2d 605, 398 S.C. 62 (S.C. 2011).

DIUC has violated the Commission’s regulations by failing or refusing to provide replacement mains or even temporary water and sewer services to the Complainants’ homes, and by not making plans for the known threat and expected damage<sup>1</sup> to its system that would impair its ability to provide water and sewer service to its existing customers. DIUC has violated Commission regulations by requiring that the Complainants pay for the “cost of installation” of equipment to restore services to its existing customers when the customers were not at fault for the damage to the utility’s equipment. DIUC has usurped Commission authority and regulations by requiring that the Complainants pay the tax under review by this Commission<sup>2</sup> and its attorney’s fees. In addition, DIUC attempted to extract an agreement from Complainants that they would not file a Complaint or take any other action against DIUC for its refusal to provide the water and sewer service that deprived Complainants of use of their homes for over two years. Even after DIUC forced the Complainants to install and pay for facilities and equipment that are DIUC’s obligation under Commission regulations, DIUC attempted to force Complainants to accept these additional conditions before DIUC would provide service. The Addendum offered by Respondent clearly included these additional terms and would breach the agreement Complainants signed even if the agreement was valid.

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<sup>1</sup> See Respondent’s pre-filed testimony of Michael Guastella, Page 4, ll 3-11.

<sup>2</sup> The Jobs Credit and Tax Act (*See* PSC Docket #2017-381-A)

Complainants had no choice but to deal with DIUC, which has sole rights to provide water and service in this territory, and had no choice but to try to re-establish water and sewer service for their homes or suffer the complete loss of their homes upon the refusal of DIUC to prepare for the well-known threats to its system and to replace its equipment when damaged.

1. The Commission has jurisdiction over this matter, because DIUC has failed to provide adequate and proper water and sewer service to Complainants.

The Commission has jurisdiction to address a utility's failure to provide adequate and proper service. See S.C. Code Ann. § 58-5-210, -710; *Patton v. Public Service Comm.*, 280 S.C. 288, 312 S.E.2d 257 (SC 1984); In RE: Petition of the Office of Regulatory Staff, 2016 WL 3054859 (SCPSC May 24, 2016); In re Utilities Services of South Carolina, Inc., 2009 WL 2987189 (2009). DIUC has failed to meet its statutory and regulatory obligations to Complainants. DIUC has failed to install and maintain the facilities and equipment as required by regulations. DIUC has also forced the individual homeowner Complainants to meet the utility's obligations and to pay for those obligations. DIUC took these actions without the required approval of the Commission.

The regulations of the Public Service Commission allow customers of a public utility to file a complaint against the utility regarding "the charges, practices, facilities, or service" of the facility. S.C. Code Regs. 103-538 and -738. The regulations also allow customers to request a hearing before the Commission with respect to such complaints. *Id.* This is exactly what Complainants have done in this matter, and the statute and regulations provide the Commission with jurisdiction to hear this Complaint and regulate this utility to address the complaints.

The regulations further provide that the utility should not discontinue service to the customers until the Commission makes a decision in the hearing. *Id.* However, in this instance, the customers were without service from DIUC for over two years and only regained service from DIUC after they filed the Complaint in this matter and the ORS, Complainants and DIUC agreed turning the water back on would not prejudice any party in this matter.

The regulations of the Public Service Commission for water and sewer service provide that a public utility shall install and maintain its facilities and equipment. S.C. Code Reg. 103-500 and -700. For example, Regulation 103-740 and Regulation 103-540 provide that:

Each utility, unless specially relieved in any case by the Commission from such obligation, shall operate and maintain in safe, efficient and proper conditions all of its facilities and equipment used in connection with the services it provides to any customer up to and including the point of delivery into systems or facilities owned by the customer.

The sewer service regulations include additional requirements for a utility to install and maintain service pipes. Regulation 103-555 states:

A. Utility's Service Pipe—The utility shall install and maintain that portion of the service pipe from the main to the boundary line of the property being served, public road, or street under which such main may be located. The connection of the service pipe to the main must be made using appropriate wyes, saddles, or other acceptable fittings.

B. Customer's Service Pipe—The customer shall install and maintain that portion of the service pipe from the end of the utility's service pipe into the premises served.

...

Utility shall be responsible for providing the location for the connection of the customer's service pipe to the utility's service pipe or the utility's main, whichever is applicable at the utility's expense, and at no expense to the customer.

Regulation 103-570.B states:

It shall be the obligation of each utility dependent upon its ability to procure and retain suitable facilities and rights for the construction and maintenance of the necessary system to furnish adequate sewerage service to its customers in the area or territory in which it operates.

Commission regulations address what a utility must do about interruptions of service:

Each utility shall make all reasonable efforts to prevent interruptions of service and, when such interruptions occur, shall endeavor to re-establish service with the shortest possible delay consistent with the safety of its customers and the general public. Scheduled interruptions should always be preceded by adequate notice to all affected customers.

S.C. Code Regs. 103-514.B; 103-714.B

These regulations require that DIUC install and maintain the facilities and equipment necessary to provide adequate and proper service to its customers. DIUC has failed to repair and replace the facilities and equipment necessary to supply water and sewer to the Complainants' homes. DIUC has willfully failed to provide water and sewer service to the Complainants' homes or even prepare in any way for the known risk to its equipment on Driftwood Cottage Lane. DIUC failed to plan for and provide replacement connections between the mains under Martinangel and Driftwood Cottage Lane, even though DIUC has admitted that erosion in this area has been a problem and that it has monitored the situation for years. Over a year before Hurricane Matthew, upon performing maintenance on the Driftwood Cottage mains, DIUC took the position that it had no such responsibility to perform the maintenance and, instead, claimed that it is the individual homeowners' responsibility to repair and replace mains and facilities to provide water and sewer

service to their property. DIUC has placed its responsibility under these regulations on the individual homeowner Complainants without Commission approval.

DIUC forced the Complainants to agree to repair, replace and pay for the utility's facilities and equipment. In forcing Complainants to do so, DIUC claimed that it would be impossible for it to procure and retain suitable facilities and rights for the construction of the necessary system to furnish adequate sewer service to its customers. Complainants have shown that it was possible even for lay people not in the utility business to acquire the easement, hire the contractors and engineers, perform the permitting, and to replace the necessary system to furnish adequate water and sewer service. DIUC then forced Complainants to transfer ownership of the new facilities and equipment installed and paid for by Complainants to DIUC. DIUC abandoned its statutory and regulatory obligations, failed to provide adequate and proper water and sewer service, and reverted to protecting its own profit by requiring its own individual customers to bear all costs.

2. The Commission has jurisdiction over this matter, because DIUC has attempted to circumvent the Commission's authority over rates by forcing the individual homeowner Complainants to fund the installation of replacement facilities and equipment now owned by the utility without Commission approval.

The Commission has jurisdiction over this matter to approve or not approve DIUC's shifting the cost burden of maintaining its system to the Complainants by forcing them to replace DIUC's facilities and equipment purportedly in an effort to avoid a request for a rate increase. DIUC claimed that the responsibility to maintain DIUC's facilities and equipment was the responsibility of the Halwigs and the Nollers, because such maintenance would affect the utility's future rates. This Commission has the sole authority to set rates for public utilities, such as DIUC. The Commission has the jurisdiction and the duty to review this matter, because it addresses both DIUC's rates and service. DIUC has not followed the state Commission's regulations in forcing the Complainants to pay for the utility's facilities and equipment.

The Commission has the authority to review the business practices and expenses of a public utility. *See Utilities Services of SC v. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (SC 2011); *Kiawah Property Owners Group v. Public Service Comm.*, 392 S.C. 232, 593 S.E.2d 148 (SC 2004); and *Patton*. In exercising its power to supervise and regulate rates and service, "the Commission must be allowed the discretion of imposing reasonable requirements on its jurisdictional utilities to insure that adequate and proper service will be rendered to the customers of the utility companies." *Patton*, 312 S.E.2d at 260. The Commission "is entitled to create incentives for utilities to improve their business practices." 708 S.E.2d at 760. The Commission "may determine that some portion of an expense actually incurred by a utility should not be passed on to consumers." *Id.* The Commission "may determine - independent of any party - that an expenditure is suspect and requires further scrutiny." *Id.* at 761. Just as the Commission has the authority to review a public utility's expenses and business practices at the time of a request for a rate increase, the Commission also has the authority and the obligation to evaluate a utility's

expenses and business practices upon complaint of its customers, particularly when such business practices are employed in order to circumvent the Commission's authority to establish rates.

The Commission also has authority over a utility's agreements regarding its willingness and ability to provide service. Commission regulations require a utility to submit a contract regarding utility service to the ORS *and* to obtain approval from the Commission:

No utility shall execute or enter into any agreement or contract with any person, firm, partnership, or corporation or any agency of the Federal, state, or local government which would impact, pertain to, or effect said utility's fitness, willingness, or ability to provide water service, including but not limited to the treatment of said water, without first submitting said contract in form to the commission and the ORS and obtaining approval of the commission.

SC Code Reg. 103-541 and -743. This language requires that the Customer Service Agreement be submitted to the Commission and the ORS, and also that it be *approved* by the Commission. The Agreement addresses and affects the utility's willingness or ability to provide water and sewer services. Regulation 103-703.C<sup>3</sup>. supports the fact that the agreement is not deemed approved or consented to by the mere filing of it. The Commission has the authority to approve, or not approve, such an agreement. Approval of this agreement, forced upon Complainants under threat of losing their homes, would be inconsistent with Commission regulations and the statutory authority to regulate the services of every utility in this state.

The pre-filed testimony of Mr. Michael Guastella includes a reference to bringing the agreement to the ORS with a question of whether it needed approval<sup>4</sup>. While the ORS responded that it did not, the regulation clearly requires that the Commission make this decision. This is clear jurisdictional authority for the Commission to find the agreement was not authorized, is void and for the parties to be put back in their financial positions prior to entering into the agreement. This would require Respondent to reimburse Complainants for the expense of replacing DIUC's mains or otherwise make them whole.

Under Regulation 103-755, a utility can charge a customer all of the costs of installing and removing the service equipment when there is a provision of temporary service to a customer. The permanent replacement of the utility's own mains in this matter is not a temporary service but a permanent service which allows these Complainants to again enjoy the use of their private property.

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<sup>3</sup> SC Code Reg. 103-703.C: No rate, *contract*, or rules and regulations of any utility under the jurisdiction of this commission shall be deemed approved or consented to by the mere filing of a schedule, or other evidence thereof, in the offices of the commission. (*emphasis added*)

<sup>4</sup> See Respondent's pre-filed testimony of Michael Guastella, Pages 21, ll 15-23, page 22, ll 1-2.

DIUC claims that it can force Complainants to pay for the replacement mains under Regulations 103-702.4 and 103-502.3, which provide as follows:

A fee paid by a customer under a contract entered into by and between the utility and its customer providing terms for the extension of the utility's mains to service the customer.

(This water regulation refers to a customer contribution in aid of construction, while the sewer regulation refers to a customer main extension fee.) DIUC has claimed that the Customer Service Agreement is such a contract. However, Complainants were not requesting an extension of the utility's mains but repair and replacement of mains that were already in place. Before the mains were damaged by the storm in 2016, the water and sewer mains under Driftwood Cottage Lane were connected to the water mains under Martinangel Road below where part of these mains were damaged on Driftwood Cottage Lane. The replacement mains installed by Complainants under the golf course connect the same mains. This work did not extend service to a new customer, and there was no increase or expansion of the service area of DIUC through replacement of the mains that were damaged. Complainants had no choice but to abandon their homes or begin the process to replace the mains to obtain service from DIUC. Only after Complainants had already hired the engineer and contractor and started the work did DIUC require a written agreement. The regulation referenced by DIUC is not a basis for forcing any agreement on an existing customer.

The Commission has jurisdiction over if and to what extent a utility like DIUC can charge an individual homeowner, like Complainants, with any tax imposed under the Jobs Credit and Tax Act. *See* PSC Docket #2017-381-A. DIUC's demand that the Complainants pay this tax to DIUC before DIUC was willing to restore service to the homes is within the Commission's jurisdiction. The Commission's broad authority to regulate utilities can address the agreement forced upon Complainants and not authorized by the Commission, the imposition of any fees or tax on the costs Complainants were forced to incur, and address DIUC's failure to plan and prepare for known and acknowledged threats to its equipment serving Complainants.

## CONCLUSION

The Commission has jurisdiction over this matter pursuant to S.C. Code Ann. Section 58-5-210, *et seq.*, which provides that the Commission is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this state." The Commission has jurisdiction over the enforcement of its regulations in the provision of services by the utilities regulated by it. The Commission has jurisdiction over this matter because DIUC is subject to all water and sewer regulations of this Commission, and has failed to provide its services to Complainants consistent with the Commission's regulations, including but not limited to S.C. Code Regs. 103-540, 541, 740, and 743; and has attempted to circumvent the Commission's authority over rates by forcing the individual homeowner Complainants to fund the installation of replacement facilities now owned by the utility, requiring the payment of a federal tax expected to

be imposed on the Respondent and payment of attorney's fees of Respondent before service would be restored under an agreement not authorized by the Commission.

Complainants also request that the hearing before the Commission now held in abeyance be scheduled as soon as possible.

Respectfully submitted,

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